

Wang (Migration) [2018] AATA 3304 (19 July 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Zelin Wang
CASE NUMBER:	1622357
DIBP REFERENCE(S):	CLF2013/45620
MEMBER:	Carmel Morfuni
DATE:	19 July 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl.801.221 of Schedule 2 to the Regulations

Statement made on 19 July 2018 at 12:37pm

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – definition of spouse – Australian marriage certificate – cohabitation – joint bank account – property in sponsor's name – sponsor's mother engage in housework – intention to have children – telephone communication – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 5CB, 65

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2 cl 801.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 13 December 2016 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 4 March 2013 on the basis of his relationship with his sponsor (the parties). At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.801.221.
3. The delegate refused to grant the visa on 13 December 2016 on the basis that the applicant did not satisfy cl. 801.221 because the delegate concluded on the basis of the evidence before her the applicant did not meet the definition of spouse in Sections 5F or 5CB of the Act.
4. The applicant holds a valid 820 visa granted on 31 July 2014.
5. The applicant appeared before the Tribunal on 12 July 2018 with the assistance of a Mandarin interpreter, to give evidence and present arguments. The sponsor and another witness did not appear but may have been available by telephone.
6. The Tribunal was of the view that because of the nature of the application, and the information and submissions that had already been forwarded to the Department and the Tribunal, that the sponsor's presence at the hearing was of importance in assisting it to make a decision. The Tribunal adjourned the matter to 19 July 2018 as a matter of fairness to give the applicant an opportunity to request the sponsor to attend.
7. The applicant was represented in relation to the review by his registered migration agent Ms. Rui Xue WU and the Tribunal was advised beforehand, that she would not appear at the hearing on 12 July 2018 and subsequently was advised that she would not appear on the adjourned date..
8. The hearing resumed on 19 July 2018. The applicant and two witnesses being the sponsor Victoria Kelly TRAN and her aunt Chua Hua ZHANG appeared and the Tribunal retained the services of a Mandarin interpreter.
9. The Tribunal has before it documentary information and evidence and oral evidence at the hearing relating to the parties' relationship which had not been provided to the delegate such as the oral evidence, statutory declarations from friends declared in 2017, a declaration from the sponsor dated 2 October 2017 and online from the applicant dated 8 June 2016. The Tribunal has made a decision on the basis of the whole of the evidence before it.
10. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in this case is whether or not the parties are in a spouse relationship and whether the applicant satisfies the criteria under r.801.221 at the date of decision.
12. The Tribunal had before it and considered the written evidence submitted by the parties, the Tribunal and Department files including information provided by or on behalf of the parties including photographs, statutory declarations, financial information and other information. These have been considered by the Tribunal in coming to its decision.
13. The criteria to be satisfied at the *time of decision* are set out in r.801.22.

Whether the parties are in a spouse or de facto relationship

14. Relevantly to this matter, cl.801.221(2) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

16. The parties have provided a copy of an Australian Marriage Certificate indicating that they married on 17 January 2013. On the evidence therefore, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

17. Regulation 1.15A

18. The applicant provided an online declaration dated 8 June 2016 which was considered by the delegate addressing the matters in r1.15A (3). Since the

delegate's decision on 3 December 2016 The sponsor has provided a statutory declaration dated 2 October 2017.

- **Financial aspects of the relationship** - including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.

19. In their declarations and in oral evidence the sponsor states that the parties both work full time and earn separate wages. The parties have provided evidence of a joint bank account operated since 2013 which indicates various household expenses. In her statutory declaration dated 2 October 2017, the sponsor indicates that the parties share their daily expenses and that the applicant gives her his salary and they have set up a direct debit facility from their joint bank account for payment of utilities which she pays. It seems from the oral evidence of the parties, that the applicant is not overtly involved to a great extent in the household finances and that the sponsor basically makes most payments as she has a better understanding and is a better financial manager.

20. Their living arrangements indicates that they have lived together since they married in 2013 for over five years. They have lived in four premises rented by the sponsor and that they have cohabited with the sponsor's mother. She and the sponsor's sister provided initial funds for the purchase of a property in the sponsor's name where the mother still resides with the parties. In answer to a question from the Tribunal, as to why the property is not in joint names the sponsor advised that her mother is traditional and very cautious and having provided much of the initial funding, it gave her greater comfort that the property is in the name of her daughter. The Tribunal accepted this explanation.

21. The Tribunal is satisfied that the evidence supports the financial aspects of the parties' relationship.

- **Nature of the household** - including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.

22. Both parties indicate that they live with the sponsor's mother who has been helping with most of the house chores including cooking and cleaning and when the sponsor is unable due to time constraints, the washing and ironing. The parties help out together when they have the time subject to their work and studies. The sponsor stated that she usually does the shopping. The parties do not have children. They have provided several statutory declarations from family and a friend, Aaron Ebert, in support of the relationship. The parties indicate that they have a relationship and run a household consistent with a normal married relationship. Given their lifestyle which includes long hours of work by both parties, it is understandable that they rely heavily on the assistance of the sponsor's mother.

23. Under these circumstances, the Tribunal is satisfied that the evidence supports these aspects of the parties' relationship

- **Social aspects of the relationship** - including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.

- In her declaration referred to in paragraph 17 the sponsor states that the parties both work and she still studies and therefore are very busy but usually have family gatherings at her sister's place or her aunt's place on the weekend and catch up with French friends sometimes for brunch and coffee and go shopping and bake together. The oral evidence supported the fact that the parties go out and for example shop together on weekends if they are not working. The applicant stated that they often go out for meals on the weekend and may go on day trips. That they have been to China together to visit the applicant's family and had a wedding celebration with relatives in China in 2013 following their Australian marriage. The parties have produced a number of statutory declarations indicating that they represent themselves as a married couple and which support the genuineness of their relationship. They have also produced photographs of leisure time spent together and with family and friends and cinema tickets.

24. The Tribunal does not attach a great deal of weight to the number of the statutory declarations of family which in its view, are not sufficiently independent however overall, the Tribunal is satisfied that the whole of the evidence including the oral evidence before it supports these aspects of the parties' relationship.

25.

- **Nature of persons' commitment to each other** - including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.

26. In their declarations referred to in paragraph 17, the applicant says that the parties hope in the future to have children and own their own home and start their own business but currently the sponsor so wants to be a good nurse working well in hospital. The sponsor states that the parties have been together for almost 5 years there were some downtimes between them but they both have good communication to solve their problems. She was questioned about this by the Tribunal at the hearing, and the Tribunal was satisfied that their relationship had the usual issues that most couples face which did not have an adverse impact on the outcome of the Tribunal's decision. The parties indicate that they plan to have children once they are able to get a bigger house and better jobs and the sponsor states "there are always obstacles in life, but we will overcome them together". The parties have lived together since October 2012. They have provided telephone bills indicating that they have had substantial contact during the time that

they have been together. Both parties work, the applicant working as a floor manager at a supermarket and the sponsor is working in a hospital furthering her profession as a radiography and pathology nurse. The evidence indicates that the parties spend time together and generally share their lives in the manner of a normal committed couple.

27. The Tribunal is satisfied that the evidence supports these aspects of the parties' relationship.

- **Any other relevant considerations.**

28. The Tribunal was concerned that the sponsor did not attend the initial hearing, however she did attend the adjourned hearing and her oral evidence had a bearing on the outcome of the Tribunal's decision.

29. On the basis of the whole of the evidence before the Tribunal, the Tribunal finds, pursuant to s.5F(2)(d), that there is a mutual commitment to shared life to the exclusion of others, a genuine and continuing relationship between the parties and that they live together and not separately and apart on a permanent basis.
30. Given these findings, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore the applicant meets the requirements of cl.801.221(2)(c).
31. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

32. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
- cl.801.221 of Schedule 2 to the Regulations

Carmel Morfuni,

Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).